Supreme Court, U.S.
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No. 05-1509

In The Supreme Court of the United States

SHERRY WHITE-BATTLE,

Petitioner,

v.

DEMOCRATIC PARTY OF VIRGINIA, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Court of Appeals error in affirming the district court's finding that the plaintiff had filed her second motion for leave to amend the complaint in bad faith?

II. Did the Court of Appeals error in affirming the district court's finding that the plaintiff's second motion for leave to amend her complaint had caused the delay and prejudice to the defendants?

III. Did the Court of Appeals error in affirming the district Court's finding that the plaintiff's second motion for leave to amend the Complaint was substantially similar to the first motion for leave to amend the complaint?

IV. Did the Court of Appeals error in affirming the district court's finding that the Fourth Circuit's mandate had established that all claims raised in the plaintiff's first motion for leave to amend complaint was in the second motion for leave to amend?

V. Did the Court of Appeals error in affirming that the district court had deliberately waited until after the Fourth Circuit's mandate was entered (5 months later) before ruling on the plaintiff's second motion for leave to amend the complaint?

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Petitioner, Sherry White-Battle("Battle") respectfully requests that a writ of certiorari be issued to review the order of the United States Court of Appeals For the Fourth Circuit.

OPINION BELOW

The United States Court of Appeals For The Fourth Circuit denied the petition for appeal on December 20, 2005 (Record No. 05-1932). The opinion was not published. (App. A) The United States District Court For the Eastern District of Virginia, Norfolk Division, entered its Order on July 29, 2004 (Case No. 03-897-2). (App. B)

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals For the Fourth Circuit ("Court of Appeal") was entered on December 20, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL , STATUTORY AND RULE PROVISION INVOLVED

Rule 15(a) of the Federal Rules of Civil Procedure provides that "...A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

STATEMENT OF THE CASE

To fully appreciate the significance of the issues presented in this case, it is essential to consider the procedural background.

On December 24, 2003, Sherry White-Battle("Battle") filed this suit in the United States District Court for the Eastern District of Virginia, Norfolk Division("District Court"), stating that the appellees had violated her rights under the First, Fourteenth and Fifteenth Amendments to the United States Constitution, Section 5 and Section 10 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973 (a) (b) (c); Section 1983, 42 U.S.C.; 28 U.S.C. Sections 1343, 2201 and 2202. Complaint, paragraph 9.

She brought this suit against the Democratic Party of Virginia("Party"), Norfolk City Democratic Committee("Committee"), George Schaefer("Schaefer") and the Norfolk Electoral Board("Board") to enforce her rights as a voter and unsuccessful candidate. Complaint paragraphs 1, 40. As a voter, Battle voted in the City of Norfolk, at St. Andrews, Precinct No. 17, on November 4, 2003 around 5:30 p.m.; however, Board's records and final certified tallies from St. Andrews did not show that her vote was counted. Complaint, paragraph 79; Exhibit A, Affidavit of Sherry White-Battle and Exhibit B, St. Andrew's certified tallies; Plaintiff's Mem. In Opp'n p. 2; Affidavit of Feb. 17, 2004; 5-27-2004, Tr. 9-12. As an unsuccessful candidate, Battle also brought suit on behalf of her candidacy and voters in the City of Norfolk, who were unable to protect their votes, which were cast between the hours of 4:00 p.m. and 7.00 p.m. on November 4, 2003. Complaint, paragraphs 79-81, 84, 86, 89, 90, 93, 96, 115; 12-30-2003, Tr. 18-20. In her Complaint, she alleged that she complained to John R. Doyle, III, the Commonwealth's Attorney of the City of Norfolk, that Schaefer, Charlene Christopher("Christopher") the Chairperson of the Committee, Barbara Klear("Klear"), the Secretary of the Committee, and others conspired to violate her rights under Virginia law. She alleged that her rights under Section 5 and Section 10 of the Voting Rights Act of 1965, as amended, 42, U.S.C. 1973 (a) (b) (c) ("the Act") and the First, Fourteenth, and Fifteenth Amendments to the Constitution of the United States were violated.

Complaint, paragraphs 9-10, 19-29, 30, 31, 112-124. The Norfolk Circuit Court appointed a special prosecutor, Eileen M. Addison, the Commonwealth's Attorney of York County Virginia, to investigate and prosecute the case. On October 23, 2003, Battle testified under oath in the Norfolk Circuit Court that she attended the Federation of Civic Leagues meeting("meeting") which was held on October 9, 2003. Complaint, paragraph 35. Battle stated to those present at the meeting that Schaefer illegally conspired with a few-well connected politicians to steal the Democratic nomination, and Schaefer did not deny the truth of her statement. On October 23, 2003, Steve Mirman, the Republican candidate for the Clerk of Court, who was present at the meeting with Battle and Schaefer, testified under oath that he witnessed Battle saying to those present that Schaefer illegally conspired with a few well-connected politicians to steal the Demoratic nomination and that Schaefer did not deny White-Battle's accusation. Complaint, paragraph 36.

The appellees, whether acting jointly or severally, were acting under the color of state law. Complaint, paragraph 10. Battle alleged that Schaefer, the Committee, including Christopher, Klear and others conspired to injure, prevent and hinder her in the free exercise or enjoyment of rights or privileges secured to her under the laws of Virginia. Complaint, paragraphs, 30-31.

On December 30, 2003, the District Court heard arguments from Battle and the appellees. Battle that, among other things, the appellees had violated her rights under Section 5 of the Act, 42 U.S.C. Sec. 1973c, when using a non-primary method. 12-30-2003, Tr. 5-6.

Battle argued that the Party's and the Committee's practices(or decisions or changes)of not providing notice when using a non-primary method of selecting of candidates; increasing payment from $500.00 to requiring a payment of $4,000.00 filing fee; and nominating candidates prior to the mandatory and statutory time, as prescribed in Section 24.2-510 of Virginia Code, violated the preclearance section of

the Act. 12-30-2003, Tr. 5-6 See Morse, et al. v. Republican Party of Virginia, et al., 517 U.S. 186, 193-229(1996). Complaint, paragraphs 19-29, 30, 31, 112-124. She argued that, in Morse, the Court held that the Republican Party of Virginia's decision to exact the registration fee was subject to Section 5, which, among other things, prohibits Virginia and other jurisdictions from enacting or enforcing "any voting qualification or prerequisite... different from that in force... on" a specified date unless the change has been pre-cleared under the Act. Battle argued that she was never afforded an equal opportunity to participate in the Party's and Committee's nomination process and election.

Battle argued to the District Court that the Board certifying Schaefer with 52 of the 55 precincts of the City of Norfolk omitting the counting of thousands of votes of citizens, who cast votes between the hours of 4:00 p.m. and 7:00 p.m. on November 4, 2003, violated her equal protection under the Fourteenth Amendment. 12-30-2003, Tr. 18-20.

Battle further argued that the public interest would be served by granting the injunction in that she had raised fundamental constitutional claims, including equal opportunity for registered voters to participate in the Norfolk political process under the Act. 12-30-2003, Tr. 5-6, 9, 12, 17. Furthermore, Battle argued that the citizens of Norfolk, who voted on November 4, 2003 between the hours of 4:00 p.m. and 7:00 p.m., interest will be served by having the District Court to make a judicial determination that their votes were counted on Election Day. 12-30-2003, Tr. 18-20.

Battle factual statements to the District Court were not disputed by the appellees, who were all present. 12-30-2003, Tr. 4. The record shows that the District Court specifically asked the appellees' counsels whether they had any objections to Battle's presentation of the facts of her case, pursuant to Rule 65(b) of the Fed. R. Civ. P., and they had no objections. 12-30-2003, Tr. 5, 22. The record further shows that Battle submitted to the District Court and mailed

to the appellees a Memorandum In Support Of Motion For Temporary Restraining Order And Preliminary Injunction and Affidavit of December 30, 2003 in which she, swore that "the facts alleged in her Complaint, which was filed on December 24, 2003 with the Clerk of Court of the United States District Court for the Eastern District of Virginia, Norfolk Division, were true to the best of her knowledge and information and belief." The appellees filed no objections or oppositions to Battle's memorandum and affidavit of December 30, 2003.

This case was appealed to the United States Court of Appeals for the Fourth Circuit ("Court of Appeals"), and Schaefer and the Board filed motions to dismiss for lack of jurisdiction. On April 30, 2004, the Court of Appeals dismissed the appeal. Sherry White-Battle v. Democratic Party of Virginia, et al., Record No. 04-1150.

Thereafter, Schaefer and the Board filed motions for summary judgment against Battle, and, on May 27, 2004, the District Court heard arguments from the parties. At the hearing, Battle again objected to the District Court hearing the case on the merits because it involved claims that some of the appellees failed to pre-clear changes in accordance with Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. 5-27-2004, Tr. 8. The District Court responded, saying, "All right. Do you have any argument you wish to make regarding the merits of the claims?" 5-27-2004, Tr. 8.

Battle again stated that she was suing the appellees as a voter and unsuccessful candidate. 5-27-2004 Tr. 9-12. However, the District Court would not permit her to sue as a voter, but only as an unsuccessful candidate. 5-27-2004, Tr. 8; Order of June 29, 2004, p. 11.

At the improper urging and ordering of the District Court, the Party and the Committee filed Motions For Summary Judgment against Battle, although lately filed. On May 27, 2004, the District Court heard argument on the

Motions For Summary Judgment and a Motion For Default Judgment filed by Battle.

On June 15, 2004, Battle filed a Motion For Leave To Amend Her Complaint with the District Court and the respondents filed their reply briefs.

On June 29, 2004, the District Court denied, among other things, Battle's Motion For Preliminary Injunction, and granted the Board's and Schaefer's Motions For Summary Judgment.

July 27, 2004, the District Court entered a Rule 16(b) Scheduling Order, which provided that plaintiff's discovery be commenced on July 27, 2005 and ended on November 17, 2004.

On August 16, 2004, Battle requested the Party and the Committee to answer her requests for admissions interrogatories and for production.

On September 29, 2004, counsel for the Party provided some answers; however, the Committee refused to provide answers to Battle's requests for discovery.

On October 5, 2004, Battle filed a Motion To Compel Discovery against the Party and the Committee, pursuant to Rule 37(B)(4), alleging that Battle had mailed discovery requests to them and that they had failed to answer or respond as required by the rules. Battle further alleged that she had made good faith attempts to secure compliance from the Party and the Committee, and she had a difficult time acquiring an available date to have the motion heard from the Party and Committee. Battle even mailed a Second Set of Discovery to the Party and Committee, however, they never answered.

October 25, 2004, Battle contacted Deputy Clerk Sandra Dance to obtain an available date to have her motion to compel heard and was told she would get back in touch with her.

On October 26, 2004, Battle served Schaefer with notice to take depositions and subpoena for documents for November 8, 2004.

On October 27, 2004, Battle had Eileen M. Addison personally served to take depositions for November 8, 2004. She was personally served on November 6, 2004.

On October 28, 2004, Battle attempted to secure subpoenas, including Eileen M. Addison's, but she was told by Deputy Clerk Sandra Dance that Judge Morgan had the matter on his docket for consideration at the hearing set for November 3, 2004.

On November 3, 2004, the District Court heard argument on the Party's and the Committee's motions for Summary Judgment and Battle's Motion To Compel Discovery. It took the motions for Summary Judgment under advisement. On the Motion To Compel, the District Court granted Battle's motion with respect to taking depositions of the Committee, Schaefer, Long and Addison. It further permitted subpoenas to be issued to these proposed witnesses.

On November 4, 2004, The District Court issued subpoenas for the witnesses to testify and to bring certain specific documents for
scheduled for November 8, 2005, November 16, 2005 and November 25, 2004.

On November 8, 2004, Battle deposed Baxter Vendrick("Vendrick") the Executive Vice Chairman of the Committee, Klear and Marilyn Doheny, a longtime active member of the Committee. Document produced by the Party and Committee revealed that Article 10, Section 10.5 of the Democratic Party Plan("Party's Plan") provides "A quorum of forty(40%) of the members of any Democratic Committee or convention shall be required to take any action..." Article VI E 1 of the By-Laws of the Committee provides "Quorum for regular meetings of the NCDC shall be forty percent of the voting members(ex-official members)."

Vendrick, who chaired the April 2, 2003 meeting in which Schaefer Schaefer was supposedly nominated, testified under oath that he did know what number of

members was required to have a quorum to conduct official business. 11-8-2004, Tr. 10.

Klear, the Secretary of the Committee and who was Schaefer's campaign treasurer testified that she had been an active member for over 30 years; she had served as secretary for the past 8 years; and served on the Party's Central Committee. 11-8-2004, Tr. 4. She testified that she kept all minutes and attendance records of the Committee's meetings. 11-8-2003, Tr. 56. Klear testified that the Committee followed the Party's Plan, its Constitution and By-Laws in nominating and certifying Schaefer. 11-8-2003, Tr. 10. She testified that the Committee's By-Laws did not require a certain amount of voting members to be present to have a quorum to conduct official business of February 5, 2003. 11-8-2003, Tr. 10. With regard to April 2, 2003, May 2003 Committee's meetings, she testified "I believe it did, but I can't give you any exact knowledge of that." 11-8-2003, Tr. 11. She had attended all meetings, exact one. 11-8-2003, Tr. 12-13. Klear testified that the Committee's meetings. 11-8-2003, Tr. 30-31. She further testified that she did not have any attendance records of the meeting in which Schaefer was nominated because she had "wiped out"(destroyed) the attendance records of the meetings held by the Committee through December 2003.

On November 10, 2004, the District Court granted Motions For Summary Judgment filed by the Party and the Committee.

On November 16, 2003, the District Court denied Battle's Motion For Leave To Amend Complaint filed on June 15, 2004.

On November 22, 2004, Battle filed a Motion For Leave To Continue Discovery.

On November 24, 2004, Battle a Motion To Alter Or Amend Judgment.

On December 10, 2004. Battle filed her Notice of Appeal.

On January 25, 2005, the District Court dismissed Battle's Motion For Leave To Continue Discovery and Motion To Alter Or Amend Judgment.

On February 28, 2005, Battle filed her second Motion For Leave To Amend Complaint.

On March 11, 2005, the Board, who had filed no answer to the Complaint, filed a late reply to the motion for leave to amend.

On March 16, 2005, the Committee filed a late reply to the motion for leave to amend.

March 22, 2005, Battle requested available dates of the appellees, which they never responded. Exhibit A.

March 28, 2005, Battle sent a letter which confirmed her conversation she had with Sandra Dance, Judge Morgan's Deputy Clerk, in which she advised Battle that she had to discuss Battle's request with Judge Morgan because the case was on appeal, and she had informed the lawyers for the appellees that they need not file answers to Battle's motion. She advised Battle that she was very busy and that she would get back in touch with her until the next week, two or three weeks from then. She apologized for such a delay Exhibit B.

On May 30, 2005, Battle again requested the District Court to advise her of a hearing date for the Motion For Leave To Amend Complaint. Exhibit C.

On June 21, 2005, the United States Court of Appeals For the Fourth Circuit("Court of Appeals") denied Battle's appeal, and, on July 14, 2005, it filed its mandate.

On July 26, 2005, the District Court denied Battle's second Motion For Leave To Amend Complaint.

On August 25, 2005, Battle filed her Notice of Appeal, and, on December 20, 2005, the United States Court of Appeals for the Fourth Circuit denied Battle's appeal.

REASONS FOR GRANTING THE WRIT

I. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's And Other United States Courts of Appeals' Prior Rulings On The Rights

Of Civil Litigants To Be Allowed Liberal Amendment To His Or Her Second Motion To Amend His or Her Complaint.

The United States Court of Appeals For the Fourth Circuit(Fourth Circuit) erred in affirming the District Court finding that Battle had filed her Second Motion For Leave To Amend Complaint("Second Motion") in bad faith.

As a result of the District Court ordering the Party, Committee, Schaefer, Elisa Long, the General Registrar of the City of Norfolk, and Eileen M. Addison to answer Battle's discovery requests, on November 3, 2004, Battle was able to obtain new evidence that was not available until after November 8, 2004. After that time, Battle acquired testimonial evidence from Vendrick, Klear and Doheny of the Committee, showing a conspiracy between them to violate Battle's federal and state's rights. In light of this newly discovered evidence, Battle, in good faith, filed a Second Motion, citing for the first time Section 1967(a) of 28 U.S.C., as a jurisdictional basis.

The newly discovered evidence provided additional evidence to Count III, of the Second Amended Complaint(Amended Complaint), which states "The Defendants Violated Battle's Rights Under Section 2 of the Voting Rights Act of 1965, As Amended." Vendrick's and Klear's testimonies provided convincing evidence that Schaefer, Christopher, Vendrick, Klear, and Doheny conspired to deny Battle of the nomination and certification for the position of Clerk of Court. Vendrick's and Klear's testimonies show that they met Schaefer in January, 2003 and agreed to support his nomination for the position of Clerk of Court. Amended Complaint, paragraphs 41, 55. The Committee set March 28, 2003 as the deadline for filing Declaration of Candidacy and paying the $4,000.00 filing fee. Amended Complaint, paragraph 41, 55. At the Committee's February 5, 2003 meeting, Schaefer presented Christopher with a cashier check dated February 5, 2003 in the amount of $4,000.00, payable to the Christopher.

Amended, as Chair of the Committee. Complaint, paragraphs 35-36.

Klear stated and Vendrick testified that the Committee gave no notice in the newspaper, as required by its By-Laws, regarding the meeting in which Schaefer was nominated. Amended Complaint, 25-26; 11-8-2004, Tr. 8.

Christopher and Klear stated that the Committee followed the Party's Plan and the Committee's By-Laws. 11-8-2004, Tr. 10; Amended Complaint, paragraphs 30, 59. Article 10, Section 10.5 of the Party's Plan provides "A quorum of forty (40%) of the members of any Democratic Committee...shall be required to take any action..."(Emphasis). Article VI E1 of the Committee's By-Laws provides "Quorum for regular meetings of the NCDC shall be forty percent of the voting members..."(Emphasis added). Amended Complaint, paragraphs 33, 34.

Vendrick, the Executive Vice-Chair of the Committee, who chaired the meeting in which Schaefer was supposedly nominated, testified that he did not know what was required to have a quorum to conduct official business of the Committee. Amended Complaint, paragraphs 45, 46. He did not know how many members it took to have a quorum to conduct official business of the Committee. Klear, who currently serves as Secretary and has served as the Committee's Chair, testified under oath that she have been active in the Committee for over 30 years. Amended Complaint, paragraphs 56-58, 60-65. Klear testified that she has served as Secretary of the Committee for the past 8 years and served on the State Central Committee. 11-8-2004, Tr. 4. Klear testified that she kept all minutes and attendance records of the Committee's meetings. 11-8-2004, Tr. 5-6. In fact, Klear testified that the Committee's By Laws did not require a certain amount of voting members to be present to have a quorum to conduct official business on February 5, 2004. 11-8-2004, Tr. 10. With regard to the March 5, 2003, April 2, 2003 and May, 2003 Committee's meetings, she testified "I believe it did, but I can't give you any exact

knowledge of that." 10-8-2004, Tr. 11. She testified that she had attended all of the meetings in question, except one. 11-8-2004, Tr. 12-13 Klear testified that the Committee's attendance records showed how many voting members were present at each of the Committee's meetings. 11-8-2004, Tr. 30-31. Klear testified that the Committee did not have attendance records of the meeting in which Schaefer was nominated. 11-8-2004, Tr. 3. Furthermore, Klear testified that she wiped out(or destroyed) the attendance records of the meetings held by the Committee through December, 2003. Amended Complaint, paragraph 66.

At the Call To Nominate A Democratic Candidate For Clerk of Court, adopted on February 5, 2003, states, among other things, that the Committee shall seek appropriate waivers from the Democratic Party regarding expediting the time frames required by the Party's Plan. Amended Complaint, Exhibit E. As before stated, Schaefer, who was present at The Call on February 5, 2003, presented a certified check in the amount of $4,000.00 to Christopher. Vendrick testified that "nobody else filed, so as a member of the City Committee, I participated in the sense that I supported him. He was the only Democrat who applied or filed to run for the nomination." 11-8-2004, Tr. 29-30. There was no need for the Committee to seek a waiver, as mentioned in The Call, because "We had a nominee(Schaefer) and there was no need to seek a waiver regarding publication in the newspaper." 11-8-2004, Tr. 32.

The newly discovered evidence reveals that Schaefer's nomination before May 9, 2003 was void or invalid under Virginia mandatory law, 24.2-510 of the Code of Virginia, as amended. Vendrick testified that he was aware of the time limitations contained in the mandatory law. Vendrick testified that he was aware of the time limitations contained in the mandatory law. Amended Complaint, paragraph 48. 11-8-2004, Tr. 15. He further testified that Schaefer was nominated before May 9, 2003. Amended Complaint, paragraph 54. 11-8-2004, Tr. 30.

In denying Battle's Second Motion, the District Court relies on Healthsouth Rehab. Hospital v. American National Red Cross et al., 101 F. 3d 1005(4th Cir. 1996). The facts in Healthsouth are clearly distinguishable from those in the case at bar in that the reasons for the District Court's failure are neither declared in its Order nor are the reasons apparent from the facts of the case. In Healthsouth, the Fourth Circuit declared that a refusal to allow Healthsouth to amend its complaint since allowing the amendment would have been futile and would have, at most, delayed the inevitable dismissal of all of its claims against Red Cross. Id. at 1011. In the case at bar, the District Court made no finding that granting Battle her Second Motion would have been futile.

In Healthsouth, the court was not confronted with the discovery of new material evidence. However, in the case at bar, Battle filed a Second Motion based on, primarily, newly discovered evidence, having a probability of changing the results of the case. In short, the Fouth Circuit ruling in Healthsouth had nothing to do with Healthsouth's newly discovered evidence. Hence, Healthsouth's facts are not applicable to the facts of this case.

Furthermore, Rule 15(a) of the Fed. R. Civ. P. provides a liberal practice in allowance of amendments to formal pleadings. Foman v. Davis, Executrix, 371 U.S. 178(1962); Coral v. Gonse, 330 F. 2d 997(4 Cir. 1964); Manual v. U.S., 846 F. Supp. 478 (E.D. Va. 1994). In exercising discretion, it must appear that successive amendments are futile, offered in bad faith, prejudicial, or otherwise contrary to the interest of justice. Ward Elect. Serv., Inc. v. First Commercial Bank, 819 F. 2d 496(4th Cir. 964).

In the case at bar, the District Court's Order of July 29, 2005 does not address the issue of bad faith with regard to the investigation and presentation of the new evidence discovered on November 8, 2004, during the period of District Court's ordered discovery. The newly discovered

evidence clearly provides congent evidence for the following claims raised in the Amended Complaint:

Count III, The Defendants Violated Battle's Rights Under Section 2 of the Voting Rights Act of 1965, As Amended;

Count V, The Defendants Conspired And Violated Battle's Rights Under 1983;

Count VII, The Committee's Nomination And Certification Of Schaefer Are Nullities.

Count VIII, The Party, Committee, And Schaefer Violated Virginia's Mandatory Law(Section 24.2-510 of the Code of Virginia, as amended) When It Nominated Schaefer Before May 9, 2003; and

Count IX, The Board Had No Authority To Certify Schaefer's Name To Be Placed On The November 3, 2003's Ballot.

Battle clearly has a right under Rule 15(a) to file an Amended Complaint against the Board without leave of court since she filed her Amended Complaint before the Board filed a responsive pleading to the Complaint in the case. The Board has never filed a responsive pleading in the case.

Accordingly, Battle's second Motion For Leave To Amend Complaint was based primarily on the newly discovered evidence, and it was not filed in bad faith.

II. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's And Other United States Courts of Appeals' Prior Rulings With Respect To The Delay and Prejudice Caused To The Defendant By The Plaintiff's Amended Complaint.

The Fourth Circuit erred in affirming the District Court's finding that Battle caused delay and prejudice to the defendants. Battle incorporates by reference the facts stated on pages 9-13.

The District Court reliance on Healthsouth is misplaced since the Party and Committee mostly caused the delay in Battle's filing of her Second Motion. Healthsouth is

distinguishable because the defendant, Red Cross, was not a part of what caused Healthsouth to file late. Healthsouth, supra t 1010.

The facts show that from July 27, 2004, the date the District Court entered its Order July 27, 2004 permitting discovery, through July 29, 2005, the date it denied Battle's Motion For Leave To Amend Complaint, Battle exercise due diligence in the filing of her Second Motion with the court. After receiving new evidence on November 8, 2004, and having her first Motion For Leave To Amend Complaint denied on November 16, 2004 by the District Court, on November 22, 2004 Battle filed a Motion For Leave To Continue Discovery. On November 24, 2004, she filed a Motion To Alter or Amend Judgment. On January 25, 2005, the District Court dismissed Battle's motions. The facts clearly show that the Board never filed an answer to Complaint and the Party and the Committee using dilatory tactics, caused much delay and expense to Battle.

In sum, the Party and the Committee, in particular, were the ones who, primarily, caused the delay and prejudice to themselves. The records, particularly, show that the District Court assisted and urged the Party and the Committee to prepare and file responsive pleadings against Battle, such as, motions for summary judgment. Nevertheless, the Party and the Committee filed their motions late.

III. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's And Other United States Courts of Appeals' Prior Rulings With Respect To Finding That The Second Motion For Leave To Amend The Complaint Is Substantially Similar To The First Motion.

The Fourth Circuit erred in affirming the District Court's finding that Battle's Second Motion was substantially similar to her First Motion to Amend Complaint. It is noteworthy that the District Court nor the Fourth Circuit cite any authority for the their position.

Clearly, the Second Motion is not substantially similar to the first Motion For Leave To Amend Complaint in that the Second Motion contains three entirely new counts, based on newly discovered evidence, Namely: Count VII, Count VIII and Count IX. Moreover the Second Motion relies on Section 1367(a) of 28 U.S.C. as a jurisdictional basis.

The Court adopted its reasoning, as contained in the January 26, 2005's Order, for denying Battle's First Motion. It is noteworthy, again, that the District Court's orders do not address the affect of the newly discovered evidence on the claims raised in the Second Motion. The Supporting Facts, as contained on pages 11-13, are herein incorporated by reference.

The newly discovered evidence, which is not cumulative and would have probably changed the result, provides additional sufficient evidence of violation as noted in Count III and Count V. In Count III, Battle alleged that the Party and the Committee violated her rights under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973(a)(b), and under Count V, Battle alleged that the defendants, appellees conspired and violated her rights under 1983, 42 U.S.C. Battle has basically satisfied the clear and exact standards for granting a new trial in the federal courts. In addition to the newly discovered evidence not being cumulative and having the probability of changing the results, the movant also must show that he or she was diligent in the investigation and presentation of the case See Garrick v. Kelly, 649 F. Supp. 607(E.D. Va. 1986) aff'd, 842 F. 2d 1290(4 Cir. 1990). In the case at bar, Battle has met the standards set by Garrick. The new evidence is not cumulative, and it has the probability of changing the results. The record shows that Battle has been diligent in her investigation and presentation of her case. Although the standards have been applied to Rule 5910, this Court should consider them in applying Rule 15(a) of the Fed. R. Civ. P.

IV. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's And Other United States Courts of Appeals' Prior Rulings That A District Court Has Power To Modify What The Appellate Court Has Not Established Or Resolved.

The Fourth Circuit erred in affirming the District Court's finding that the Fourth Circuit's mandate, affirming the court's order granting summary judgment to defendants and denying Battle's first motion to amend and motion to continue discovery, precludes it from addressing all claims raised in her Second Motion. As aforementioned, Count VII, Count VIIII, and Court IX were not a part of Battle's First Motion To Amend Complaint. Hence, the Fourth Circuit's Mandate did not preclude the District Court from acting on these claims.

Accordingly, Counts III and V are not substantially similar for reasons previously stated.

The District Court cites Dubuit v. Hartwell Enterprises, Inc., 540 F. 2d 690(4th Cir. 1976) for the proposition that the jurisdiction of a district court post-appeal is "dependent upon the terms of the appellate court mandate." In the case at bar, Count VII, Count VIII and Count IX were not a part of Battle's First Motion For Leave To Amend, which Fourth Circuit's mandate covered. Hence, the District Court had the power to act since these counts/claims were not a part of the terms and issues involved in the Fourth Circuit's mandate.

The District Court also cites Durant v. Essex, 101 U.S. 555(1880) for the position that, where the mandates affirms a district court's decree, the district court "can only record [the appellate court's] order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what [the appellate court] has established."(Emphasis added). The Fourth Circuit erred here since the District Court, at bar, had the power to decide Battle's Second Motion's Count VII, Count VIII and Count

IX because the Fourth Circuit had not established those counts or claims in its mandate.

Accordingly, The District Court does have the power to modify what the appellate court have not established or resolved.

V. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's And Other United States Courts of Appeals' Prior Rulings That A District Court's Abuses Its Discretion By Waiting 5 Months To Rule On The Plaintiff's Motion For Leave To Amend Complaint.

Battle filed her Second Motion on February 28, 2005. The record shows that the District Court deliberately delayed ruling on the second Motion, and the Party and the Committee used delay and dilatory tactics in this case. On March 28, 2005, which within 30 days required by Local Rule 7(D) of the District Court, Battle contacted the District Court's Deputy Clerk Dance, who informed her that she had advised the lawyers for the Party and the Committee not to answer her Second Motion, and she was advised Battle that she was very busy. On May 30, 2005, Battle again requested an available date to hear her Second Motion. The District Court never responded nor granted the hearing requested but , instead, unfairly, on July 26, 2005, denied Battle's Second Motion five(5) months after it was filed. Rule 15(a) permits a party to amend a pleading by leave of court; such leave "shall be freely given when justice so requires." Forman, supra. A district court may not "use its discretion, either arbitrarily, or in a way that undermines the basic policy of the rule." Keegan v. Dalton, 899 F. Supp. 1503(E.D. Va. 1995).

Accordingly, the record shows that the District Court undermined the basic policy of the rule by deliberately delaying its ruling on the Second Motion and allowing the counsels for the appellees to use every delay tactics, to cause the delay, even after Battle complained to the District Court.

CONCLUSION

If this Court does not grant Battle a writ of certiorari to the Fourth Circuit, a major injustice would remain in the City of Norfolk in that the Democratic Party of Virginia and the Norfolk City Democratic Committee will continue to sanction void nominations of candidates for public office, and the Norfolk Electoral Board will continue certifying these void nominations for public offices. For the foregoing reasons, Battle respectfully requests that a writ of certiorari be sent to the Fourth Circuit.

Respectfully submitted,

SHERRY WHITE-BATTLE

Sherry White-Battle
1225 Boissevain Avenue
Norfolk, Virginia 23507
(757) 622-2112

No. _____

In The Supreme Court of the United States

SHERRY WHITE-BATTLE,

Petitioner,

v.

DEMOCRATIC PARTY OF VIRGINIA, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1932

SHERRY WHITE-BATTLE,

Plaintiff – Appellant,

Versus

DEMOCRATIC PARTY OF VIRGINIA; NORFOLK CITY DEMOCRATIC COMMITTEE; GEORGE SCHAEFER; NORFOLK
ELECTORAL BOARD,

Defendant – Appellees,

- -

ELISA LONG, General Registrar of the City of Norfolk; EILEEN M. ADDISON.

Movants.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Henry Coke Morgan, Jr., Senior District Judge. (CA-03-897-2)

Submitted: December 15, 2005
Decided: December 20, 2005

Before MICHAEL and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Sherry White-Battle, Appellant Pro Se. Stephen Edward Heretick, FIRST VIRGINIA BANK BUILDING, Portsmouth, Virginia; Robert Bryan Rigney, A. Christopher Zaleski, PROTOGYROU & RIGNEY, PLC, Norfolk, Virginia; Samuel Lawrence Dumville, NORRIS & ST. CLAIR, PC, Virginia Beach, Virginia; Melvin Wayne Ringer, CITY ATTORNEY'S OFFICE, Norfolk, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Sherry White-Battle appeals the district court's order denying her second motion to amend her complaint. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See White-Battle v. Democratic Party of Virginia, No. CA-03-897-2 (E.D. Va. July 29, 2005). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

SHERRY WHITE-BATTLE,

PLAINTIFF,

FILED JULY 29, 2005

v. - CIVIL ACTION NO:2:03CV897

DEMOCRATIC PARTY OF
VIRGINIA, et al.,

DEFENDANTS.

ORDER

This matter is before the Court on Plaintiff Sherry White-Battle's Second Motion to Amend the Complaint filed February 28, 2005 (Doc. 94).

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On December 24, 2003, the Plaintiff filed a Complaint in this Court against the Democratic Party of Virginia ("DPV"), the Norfolk City Democratic Committee ("NDC"), George Schaefer ("Schaefer"), and the Norfolk Electoral Board ("NEB") (Doc. 1), The Plaintiff alleged violations of her First, Fourteenth, and Fifteenth Amendment rights, as well as Sections Five and Ten of the Voting Rights Acts of 1965, 42 U.S.C. § 1973(a), (b), (c), and 42 U.S.C. § 1983 (Compl. At ¶ 9). This action arose out of the Plaintiff's failed attempts to become the Democratic nominee in the election for the Clerk of the Norfolk Circuit Court. On January 27, 2004, the NEB filed its Motion for Summary Judgment (Doc. 9). On February 2, 2004, 2004, Schaefer filed his Motion for Summary Judgment (Doc. 15). The Court heard argument on the Motions for Summary

Judgment on May 27, 2004 and **GRANTED** the NEB's and Schaefer's Motions for Summary Judgment. See Order, entered June 29, 2004 (Doc. 51) and Judgment, entered June 29, 2004 (Doc. 52).

NDC filed a Motion for Summary Judgment on June 9, 2004 (Doc. 39). Plaintiff filed a Motion for Leave to Amend the Complaint on June 15, 2004(Doc. 43). Defendant DPV filed a Motion for Summary Judgment on September 3, 2004 (Doc. 63). On November 10, 2004 (Doc. 79) and Judgment entered November 10, 2004 (Doc. 80). The Court disposed of the remaining pending motion, Plaintiff's Motion for Leave to Amend the Complaint by **DENYING** the motion in an Order entered November 16, 2004 (Doc. 82).

Plaintiff then filed a Motion for Leave to Continue Discovery on November 22, 2004 (Doc. 83) and a Motion to Alter or Amend Judgment on November 24, 2004 (Doc. 85), which the Court **DENIED** in an Order entered January 26, 2005 (Doc. 93).

Plaintiff filed a Second Motion to Amend the Complaint on February 28, 2005 ("Second Motion") (Doc. 94), to which Defendant Schaefer responded on March 7, 2005 (Doc. 95), Defendant NEB on March 11, 2005 (Doc. 97) and Defendant NDC on March 16, 2005 (Doc. 98).

Plaintiff had also filed a notice of appeal on December 10, 2004 (Doc. 89), which the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") **DENIED**. See Opinion filed in this Court June 22, 2005 (Doc. 100) and mandate filed in this Court on July 14, 2004 (Doc 101)

PLAINTIFF'S SECOND MOTION TO AMEND THE COMPLAINT

"Leave [to amend] shall be freely given when justice so requires." FED. R. CIV. P. 15(A). However, leave should not be given when there has been "undue delay, bad faith, or dilatory motive on the part of the movant, . . .undue prejudice to the opposing party by virtue of allowance of the

amendment, futility of amendment, etc..." Healthsouth Rehab. Hosp. v. Am. Nat'l Red Cross ("Healthsouth"), 101 F.3d 1005, 1010 (4th Cir. 1996), quoting Foman v. Davis, 371 U.S. 178, 182 (1962). See also Healthsouth, citing Deasy v. Hill 833 F. 2d 38, 40 (4th Cir. 1987) (delay by itself is not enough to deny leave, but is enough when combined with prejudice to the defendant).

Plaintiff's Second Motion is substantially similar to her First Motion to Amend the Complaint ("First Motion"). See Docs. 43 & 94. In a previous Order, the Court explained in detail its reasoning for denying Plaintiff's First Motion. See Order entered January 26, 2005, ft. 2 (Doc. 93). In addition to the reasons provided in that Order, the Court notes that this Second Motion was filed after judgment had been entered against the remaining two defendants, after Plaintiff filed a notice of appeal of that judgment, and after the Court issued an order dismissing Plaintiff's motions to amend and alter the judgment.

Additionally, the jurisdiction of a district court post-appeal is "dependent upon the terms of the appellate mandate." DuBuit v. Hartwell Enterprises, Inc., 540 F.2d 690 (4th Cir. 1976). Where the mandate affirms a district court's decree, the district court "can only record [the appellate court's] order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what [the appellate court] has established." Durant v. Essex Company, 101 U.S. 555 (1880). Here, the Fourth Circuit has issued a mandate affirming this Court's orders granting summary judgment to Defendants and denying Plaintiff's motions to amend and for discovery. See Mandate filed in this Court July 14, 2005 (Doc. 101). As already noted, the Second Motion is substantially similar to the first, the denial of which was reviewed by the Fourth Circuit.

Accordingly, the Court **DENIES** Plaintiff's Second Motion to Amend the Complaint.

The Clerk is **REQUESTED** to mail a copy of this Order to the Plaintiff and all counsel of record.

It is so **ORDERED.**

/s/ Henry Coke Morgan
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE
Norfolk, Virginia
July 26, 2005